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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 CAMERON MITCHELL and ROBERTA
9 MITCHELL, husband and wife,

10 Plaintiffs,

11 v.

12 WERNER COMPANY, a Delaware
13 corporation; and W.W. GRAINGER,
14 INC., an Illinois corporation,

Defendant.

CASE NO. C11-5543BHS

ORDER GRANTING
PLAINTIFFS' MOTION FOR
VOLUNTARY DISMISSAL

15 This matter comes before the Court on Plaintiff Cameron and Roberta Mitchell's
16 ("Mitchells") motion for voluntary dismissal without prejudice (Dkt. 30). The Court has
17 reviewed the briefs filed in support of and in opposition to the motion and the remainder
18 of the file and hereby grants the motion for the reasons stated herein.

19 **I. PROCEDURAL HISTORY**

20 On July 15, 2011, the Mitchells filed a complaint against Defendant Werner
21 Company ("Werner"), alleging negligence and strict liability for injuries suffered by Mr.
22 Mitchell. Dkt. 1.

23 On January 10, 2012, the Court granted the Mitchells leave to file an amended
24 complaint. Dkt. 10. On January 11, 2012, the Mitchells filed an amended complaint
25 adding Defendant W.W. Grainger ("Grainger"). Dkt. 11 ("FAC").
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27 On February 16, 2012, the Mitchells filed a motion to amend their complaint to
28 add New Werner Holding Co. ("New Werner") as a Defendant. Dkt. 16. On March 20,

1 2012, the Court denied the motion. Dkt. 28. Subsequent to this order, the Mitchells filed
2 a complaint in state court against Werner, Grainger, and New Werner.

3 On March 29, 2012, the Mitchells filed a motion for voluntary dismissal of this
4 action without prejudice. Dkt. 30. On April 11, 2012, Werner and Grainger
5 (“Defendants”) responded. Dkt. 31. On April 13, 2012, the Mitchells replied and
6 included a motion to strike Defendants’ response. Dkt. 32.

7 **II. DISCUSSION**

8 **A. Motion to Strike**

9 The Mitchells move to strike Defendants’ response because it was not filed on
10 time. Dkt. 32 at 1–2. The Mitchells have failed to show any prejudice resulting from the
11 late filing. Therefore, the Court denies the motion to strike.

12 **B. Motion for Voluntary Dismissal**

13 Federal Rule of Civil Procedure Rule 41(a) governs the voluntary dismissal of an
14 action in federal court. Rule 41(a)(2) provides that unless a plaintiff files a notice of
15 dismissal before the opposing party serves either an answer or a motion for summary
16 judgment, or the parties stipulate to the dismissal of the action, “[a]n action may be
17 dismissed at the plaintiff’s request only by court order, on terms that the court considers
18 proper” Fed. R. Civ. P. § 41(a)(2). The decision to grant or deny a motion pursuant
19 to Rule 41(a)(2) is within the sound discretion of the trial court and may be reviewed only
20 for abuse of that discretion. *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir.
21 1980).

22 A motion for voluntary dismissal pursuant to Rule 41(a)(2) should be granted
23 unless a defendant can show that it will suffer some plain legal prejudice as a result of the
24 dismissal. *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Stevedoring Services of*
25 *America v. Armilla Intern. B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (stating that the
26 purpose of Rule 41(a)(2) is “to permit a plaintiff to dismiss an action without prejudice so
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1 long as the defendant will not be prejudiced . . . or unfairly affected by dismissal.”).

2 Because Rule 41(a)(2) exists chiefly for the defendant’s protection, the district court has

3 the discretion to condition a dismissal without prejudice upon the payment of

4 “appropriate costs and attorney fees.” *Westlands Water Dist. v. United States*, 100 F.3d

5 94, 96 (9th Cir.1996). The payment of fees, however, is not a prerequisite to a Rule 41(a)

6 dismissal. *Stevedoring*, 889 F.2d at 921 (9th Cir. 1989) (“no circuit court has held that

7 payment of the defendant’s costs and attorney fees is a prerequisite to an order granting

8 voluntary dismissal.”). If an award of fees and costs is granted, “the defendant should

9 only be awarded attorney’s fees for work which cannot be used in any future litigation of

10 these claims.” *Westlands*, 100 F.3d at 97 (citing *Koch v. Hankins*, 8 F.3d 650, 652 (9th

11 Cir. 1993)).

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13 In this case, Defendants request that the Court either require the Mitchells to file

14 their subsequent complaint in this same District Court and/or award Defendants

15 recoverable costs. Dkt. 31 at 5. First, the only case that Defendants cite in support of

16 their request for a venue restriction is distinguishable on the ground that the parties had

17 litigated the issue of proper venue before the motion for voluntary dismissal was filed.

18 *See Versa Products, Inc. v. Home Depot, USA, Inc.*, 387 F.3d 1325, 1326 (11th Cir. 2004)

19 (“Home Depot obtained, under 28 U.S.C. section 1404(a), a transfer of the action, for

20 *forum non conveniens*, to the Northern District of Georgia.”). Defendants’ argument is

21 without merit because the Mitchells are free to choose their own forum, even if the action

22 may ultimately be removed to this Court.

23 Second, the Court finds that an award of fees is not appropriate. The only issues

24 that were litigated in this case were amendments to the complaint. Defendants have failed

25 to show that the work done on these issues will not be useful in the subsequent action.

26 Therefore, the Court grants the Mitchells’ motion without conditions or an award of costs.


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1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that the Mitchells' motion for voluntary
3 dismissal without prejudice (Dkt. 30) is **GRANTED** and the Mitchells' motion to strike
4 (Dkt. 32) is **DENIED**.

5 DATED this 20th day of April, 2012.

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8 BENJAMIN H. SETTLE
9 United States District Judge
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